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DEPARTMENT OF JUSTICE  
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January 22, 2010

Victor F. Battaglia, Esquire  
Biggs and Battaglia  
921 North Orange Street  
P.O. Box 1489  
Wilmington, DE 19899

**RE: Freedom of Information Act Complaint  
Against City of Wilmington**

Dear Mr. Battaglia:

On October 23, 2009, the Delaware Department of Justice ("DDOJ") received your complaint that the City of Wilmington ("the City") violated the Freedom of Information Act ("FOIA") by refusing to provide you with public records. On October 26, 2009, the DDOJ forwarded your complaint letter to the City, which requested and received a one-week extension to respond. We received the City's timely response on November 12, 2009. This is the DDOJ's determination of your complaint pursuant to 29 *Del. C. § 10005(e)*.

**RELEVANT FACTS**

According to the City, you represent the Carriage House Row condominiums in its dispute with the City over its water system. Carriage House Row wants the City to install individual usage meters in each unit, which the City refuses to do because it believes that installation of such meters was the duty of the developer and/or the

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prospective owners upon purchase of the units. On September 8, 2009, you requested from the Wilmington Department of Public Works a wide range of documents pertaining to City Water Department Account No. 500,140 as well as all water service agreements for the Brandywine Falls and Bancroft Mills condominiums. According to the affidavit of Wilmington Law Department attorney Carol Casner, in a September 24, 2009 conversation, you told her that you were trying a “new approach” to settling the water issues “rather than just filing suit.” You asked her to “admit that the City has violated Code” by allowing the Carriage House Row water system to exist and, when she refused, you “hinted” you would have to bring suit. Based on her conversations with you and her legal experience, Ms. Casner believes that you will file suit against the City as soon as you have received the requested records. On October 15, 2009, the City denied your FOIA request, citing the “potential litigation” exception found in 29 *Del. C.* § 10002(g)(9).

#### **RELEVANT STATUTES**

FOIA requires that public records be made available to the public for inspection and copying. 29 *Del. C.* § 10003(a). Although the definition of a public record is broad, there is an exception for “records pertaining to pending or potential litigation which are not records of any court.” 29 *Del. C.* § 10002(g)(9).

### **DISCUSSION**

FOIA provides in its declaration of policy, “it is vital that [the public] have easy access to public records in order that society remain free and democratic. Towards these ends, and to further the accountability of government to the [public], this chapter is adopted, and shall be construed.” 29 Del. C. § 10001.<sup>1</sup> In order to comply with that statement of legislative purpose, the rights FOIA creates are construed broadly, while the exceptions to those rights are construed narrowly. *Am. Civil Liberties Union of Del. v. Danberg*, 2007 WL 901592, \*3 (Del. Super. March 15, 2007); *see Del. Solid Waste Auth’y v. The News-Journal Co.*, 480 A.2d 628, 631 (Del. 1984). The burden of proof is on the public body that invokes a public records exception, such as the potential litigation exception, in response to a FOIA request for records. 29 Del. C. § 10005(c).

Section 10002(g)(9) of Title 29 permits a public body to withhold a record that would otherwise be public if the record pertains to “potential litigation.” Because the potential for litigation exists on a continuum, the courts have applied a two part test to determine whether that potential is substantial enough to warrant application of the FOIA exception: “(1) litigation must be likely or reasonably foreseeable; and (2) there must be a ‘clear nexus’ between the requested documents and the subject matter of the litigation.” *ACLU of Del., supra* at \*4 (quoting *Del. Op. Atty. Gen. 02-IB30*, 2002 WL 31867904, \* 2 (Del. A.G. Dec. 2, 2002)).

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<sup>1</sup> Although FOIA refers to “citizens” of the State, and not to the public, FOIA must apply to the entire public, not just citizens of Delaware, in order to be constitutional. *Lee v. Minner*, 458 F.3d 194 (3<sup>d</sup> Cir. 2006).

In this case, we are concerned only with the first prong: whether a lawsuit against the City is sufficiently likely to warrant use of the potential litigation exception. “[T]he public body must be able to point to a ‘realistic and tangible threat of litigation . . . characterized with reference to objective factors’ before it may avail itself of the ‘potential litigation’ exception to FOIA.” *Id.* (quoting *Claxton Enter. v. Evans County Bd. of Comm’r*, 549 S.E.2d 830, 834-35 (Ga. App. 2001)). “Objective factors” are necessary in order to prevent the “potential litigation” exception from cutting too wide a swath through FOIA. *Id.* FOIA records requests often result from a dispute with the government. To allow the government to withhold records relating to any dispute that might end in litigation would swallow up a significant part of the public’s right to government records. By looking for objective evidence of the requesting party’s intent, the appropriate balance is struck “between the need to construe the exceptions to FOIA narrowly and the need to give effect to the actual words of the statute which provide for the exception.” *Id.* We must look for objective harbingers of litigation, such as “a written demand letter in which a claim is asserted, or action is demanded . . . or [ ] proof that a party has both retained counsel with respect to the claim at issue and has expressed an intent to sue.” *Id.*

The City has not produced any objective evidence to support its position. While the City’s attorney honestly believes that litigation is imminent, her opinion is based on her ineffable impressions of your remarks, and, therefore, subjective. While it certainly appears that your client is contemplating a lawsuit, it is not sufficiently clear that there is

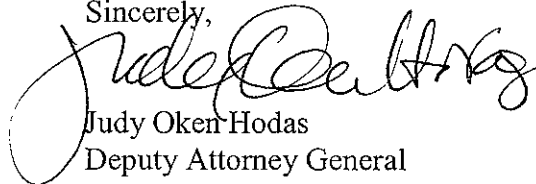
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a "realistic and tangible threat of litigation," and in a close case, the determination must be in favor of the public's FOIA rights.

**CONCLUSION**

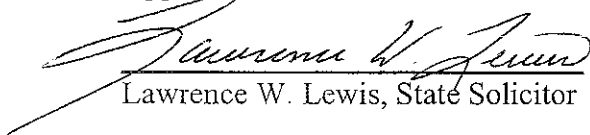
For the reasons stated above, we determine that the City of Wilmington has violated the Freedom of Information Act by withholding the requested records on the grounds that they pertain to potential litigation.

Sincerely,



Judy Oken Hodas  
Deputy Attorney General

Approved:



Lawrence W. Lewis, State Solicitor

cc: Katrina Barbour, Opinion Coordinator ✓  
Martin C. Meltzer, Esquire